

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

UNITED STATES OF AMERICA and)
THE STATE OF WISCONSIN,) Case Action No. 1:10-CV-00910
Plaintiffs,) Hon. William C. Griesbach
v.)
NCR CORPORATION, et al.,)
Defendants.)

)

**CERTAIN DEFENDANTS'¹ OPPOSITION TO THE UNITED STATES' CIVIL L. R. 7(h)
EXPEDITED NON-DISPOSITIVE MOTION *IN LIMINE*
TO EXCLUDE OPINIONS AND TESTIMONY OF
DEFENDANTS' PROPOSED REMEDY CHALLENGE EXPERTS**

The United States' Motion (Dkt. 519) should be denied because Mr. Fuglevand's report includes opinions on the dredging by the U.S. Army Corps of Engineers relevant to issues clearly part of the trial, namely: (1) divisibility; and, (2) the equities of the case as required by CERCLA section 106(a). Divisibility unquestionably is part of the December 3, 2012 trial (Dkt. 481-2). As to the equities, CERCLA section 106(a) requires the United States to prove three things to obtain an injunction, including that the equities of the case require the particular injunction being sought. The CERCLA section 106(a) requirements for an injunction are a key subject in the Motion *In Limine* to Establish the Elements of Plaintiff United States' Prima Facie Case on its Fifth Claim For Relief filed by the Certain Defendants on September 26, 2012 (Dkt. 520). In addition, the equities of the case partly are the subject of the Plaintiffs' motion to strike

¹ "Certain Defendants" are CBC Coating, Inc., P.H. Glatfelter Company, Menasha Corporation, Neenah Menasha Sewerage Commission, U.S. Paper Mills Corp. and WTM I Company. Counsel for Certain Defendants are listed in the signature page of the Opposition.

the defendants' equitable defenses (Dkt. 430, 430-1, 431, 443, 444 and 456). Plaintiffs' motion to strike is briefed fully.

Certain Defendants agree that a *portion* of Mr. Fuglevand's report addresses the failure by the Environmental Protection Agency and the Wisconsin Department of Natural Resources to follow the National Contingency Plan ("NCP") and the requirements of CERCLA section 121(a) and (b). Thus, a *portion* of Mr. Fuglevand's report is covered by the Court's August 30, 2012 decision (Dkt. 498). CERCLA section 121(a) requires that: "The President shall select appropriate remedial actions . . . which provide for cost-effective response. In evaluating the cost-effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required." 42 U.S.C. § 9621(a). Section 121(b) of CERCLA similarly requires that the "President shall select a remedial that is protective of human health and the environment, that is cost effective . . ." 42 U.S.C. § 9621(b). The opinions of Mr. Fuglevand on this topic, whether the cost-effectiveness analysis of the remedy selection process complied with the NCP, are in the same vein as those of Jeffery Zelikson, whose report was the subject of NCR's motion for reconsideration (Dkt. 501-1) that was granted on September 25, 2012. Dkt. 522. For the reasons discussed in NCR's motion for reconsideration (Dkt. 500), Mr. Fuglevand's opinions should be allowed.

For all the reasons discussed above, the Motion should be denied.

Dated: September 27, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically filed the following document(s):

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with the Clerk of the Court using the Electronic Court Filing System, which sent notification of such filing to the following:

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